Supreme Court, U.S.
FILED

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No. 97-___

In The

Supreme Court of the United States

October Term, 1996

EDWIN DeJESUS,

Petitioner,

v.

JOHN R. STEPANIK, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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27 pp

QUESTION PRESENTED FOR REVIEW

DOES THE SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ENVISION TRIAL COUNSEL RAISING ALL REASONABLE AND NON-CONTRADICTORY DEFENSES TO A CRIMINAL CHARGE?

LIST OF ALL PARTIES

THE CAPTION OF THE CASE IN THIS COURT CONTAINS THE NAMES OF TWO OF THE PARTIES, PETITIONER EDWIN DeJESUS AND RESPONDENT JOHN R. STEPANIK, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION, DALLAS, PENNSYLVANIA. THE TWO ADDITIONAL PARTIES ARE LYNNE ABRAHAM, DISTRICT ATTORNEY OF PHILADELPHIA COUNTY, PENNSYLVANIA AND WALTER COHEN, THEN-ACTING ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Edwin DeJesus respectfully prays that a writ of certiorari issue to review the judgment order of the Court of Appeals for the Third Circuit entered in the above-entitled proceeding on June 26, 1997.

OPINIONS BELOW

The unreported judgment order of the Court of Appeals for the Third Circuit, No. 96-1329 dated June 26, 1997 is attached hereto as *Appendix C*. The unreported order of the United States District Court for the Eastern District of Pennsylvania No. 95-CV-05631 dated April 3, 1996 is attached hereto as *Appendix B*. The unreported report and recommendation of the United States Magistrate Judge for the Eastern District of Pennsylvania dated January 23, 1996 denying the Petition for Writ of Habeas Corpus is attached hereto as *Appendix A*.

JURISDICTION

The judgment order of the United States Court of Appeals for the Third Circuit was entered on June 26, 1997. This Petition is filed within 90 days of June 26, 1997. Rule 13.1 (1997 rev.). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Petitioner Edwin DeJesus was tried by the Honorable Juanita Kidd Stout, Court of Common Pleas, Philadelphia County, on murder and firearm charges in a bench trial held on September 14 and 15, 1982. These charges stemmed from the November 15, 1981 shooting death of Petitioner's then-girlfriend, Martha Quinones. The defense proffered by defense counsel was homicide by misadventure; *i.e.*, accident. Judge Stout rejected this defense and found Petitioner guilty of first degree murder and possessing an instrument of crime.

Petitioner was formally sentenced to a term of mandatory life imprisonment on July 26, 1983. Prior to the imposition of sentence, Petitioner retained new counsel and filed post-trial motions alleging, *inter alia*, that trial counsel rendered constitutionally ineffective assistance of counsel by failing to raise as an alternative to the defense of homicide by misadventure, the diminished capacity defense based upon Petitioner's intoxication at the time of the shooting. Post-trial motions were formally denied by Judge Stout immediately before sentencing.

Petitioner appealed to the Superior Court of Pennsylvania which affirmed the judgment of sentence on

December 21, 1984. *Commonwealth v. Edwin DeJesus*, 488 A.2d 1162 (Pa. Super. Ct. 1984). Petitioner's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied at No. 56 E.D. Allocatur Docket 1985. Petitioner's request for state post-conviction relief was denied on December 11, 1991.

Petitioner thereafter commenced this federal habeas corpus action by filing, on August 30, 1995, a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 by a Person in State Custody. This matter was captioned as *Edwin DeJesus v. John R. Stepanik, et al.*, 95-CV-5631. The Commonwealth of Pennsylvania as respondent, conceded that Petitioner's constitutional ineffective assistance of counsel claim was ripe for federal habeas corpus review.

The matter was assigned to the United States District Court Judge Marjorie O. Rendell who, in turn, commissioned United States Magistrate Judge Arnold C. Rapoport to prepare a Report and Recommendation. Magistrate Judge Rapoport recommended, on January 22, 1996, that the Petition for Habeas Corpus be denied without an evidentiary hearing and opined that there was no probable cause for appeal. *Appendix A*. This Report and Recommendation was adopted on April 3, 1996 by the United States District Court Judge Clarence C. Newcomer, who had replaced Judge Rendell. *Appendix B*.

Petitioner thereafter made an application with the Court of Appeals for the Third Circuit for a Certificate of Probable Cause pursuant to 28 U.S.C. § 2253 and *Fed. R.A.P.* 22(b). The Third Circuit granted the Certificate of Probable Cause on October 2, 1996. In a Judgment Order

dated June 26, 1997, the Court of Appeals for the Third Circuit affirmed the district court. *Appendix C.*

REASONS FOR GRANTING THE WRIT

The Sixth Amendment guarantee of an accused's right to the assistance of counsel includes the right to the "effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). "[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel." *Id.* at 771.

In *United States v. Cronic*, 466 U.S. 648 (1984), this Court reiterated that the text of the Sixth Amendment implicitly subsumes the existence of a constitutional right to the effective assistance of counsel:

> [t]he special value of the right to the assistance of counsel explains why "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." . . . The text of the Sixth Amendment itself suggests as much. The Amendment requires not merely the provision of counsel to the accused, but "Assistance," which is to be "for his defence." [sic]. Thus, "the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor.". . . . If no actual "Assistance" "for" the accused's "defence" [sic] is provided, then the constitutional guarantee has been violated.

Id. at 654 (footnote and citations omitted).

The instant case gives the Court an opportunity of determining whether the Sixth Amendment's right to the effective assistance of counsel necessitates trial counsel raising all reasonable and non-contradictory defenses to a criminal charge. By granting the instant Petition for a Writ of Certiorari, the Court will have the opportunity to set a general and flexible framework governing the presentation of criminal defenses within the context of the Sixth Amendment.

The issue in this case is whether trial counsel was ineffective in failing to raise the defense of diminished capacity as an alternative, or fall-back, defense to the principal claim that the shooting of Martha Quinones by Petitioner was homicide by misadventure. Whether trial counsel was ineffective in failing to alert the fact-finder to the existence of the diminished capacity defense must be evaluated against the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). First, Petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Additionally, Petitioner must show that counsel's deficient performance "prejudiced the defense" by "depriv[ing] the [petitioner] of a fair trial, a trial whose result is reliable." *Id.* at 687. Petitioner ". . . must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Pennsylvania law provides that voluntary intoxication may serve to reduce murder from the first degree to the third degree. 18 Pa. C.S.A. § 308. This "diminished capacity" statute provides, in relevant part:

> . . . evidence of such [voluntary] intoxication or drugged condition of the defendant may be offered by the defendant whenever it is relevant to reduce murder from a higher to a lower degree of murder.

Id.

At trial, the Commonwealth presented evidence, via Petitioner's confession to Homicide Sergeant William McKelvie, that prior to the shooting, Petitioner "had been drinking . . . [and] had about 4 or 5 beers, 12 ounce cans, and . . . wasn't feeling too good." The Commonwealth also introduced a statement Petitioner gave to Detective Michael Holster that Petitioner had surgery the previous Tuesday.

This evidence of Petitioner's intoxication and physical incapacity would have been bolstered through the testimony of Francisco Montanez, a character witness at Petitioner's trial, who had been drinking with Petitioner prior to the shooting. Mr. Montanez testified at a March 10, 1983 post-trial motion hearing that he had been playing dominoes and drinking beer and shots of gin with Petitioner at a bar located at Fifth and Somerset Streets, Philadelphia on the day of the shooting and had last seen Petitioner at 6:00 p.m. in a drunken condition. Mr. Montanez had provided this information to trial counsel prior to trial and would have related it had he been so questioned.

At a post trial evidentiary hearing held on April 19, 1983, trial counsel was asked about his failure to raise the diminished capacity defense and his failure to call Mr. Montanez to support it. Trial counsel testified that the

shooting was an "accident," or "homicide by misadventure" as he characterized it at trial. Trial counsel acknowledged being aware of Mr. Montanez' existence and the substance of his testimony before trial but "felt that he was not a really good witness, although, in fact, he had seen Petitioner at the bar and had been with him." Finally, trial counsel was of the opinion the diminished capacity defense and defense of accident were mutually exclusive "[a]nd that the issue of intoxication would not have any bearing on the issue of whether there was an accident[.]"

The reasonableness of what defense counsel should pursue on behalf of his client must be evaluated in the context of all the circumstances of the case, with a heavy dosage of deference to counsel's judgments. *Strickland*, 466 U.S. at 691. Where, however, there is no advantage to forego a particular defense, trial counsel is constitutionally ineffective when his unprofessional error prejudices his client's case. *Profitt v. Waldron*, 831 F.2d 1245, 1249 (5th Cir. 1987). Evaluating all the circumstances of the instant case leads to the inescapable conclusion that trial counsel's exclusive reliance on the defense of homicide by misadventure at the expense of diminished capacity presented no advantage to Petitioner.

The defense of homicide by misadventure in Pennsylvania is set out in *Commonwealth v. Musi*, 486 Pa. 102, 404 A.2d 378 (1979), a case alluded to by trial counsel in his closing argument.

> "Three elements enter in the defense of excusable homicide by misadventure: (1) The act resulting in death must be a lawful one; (2) It must be done with reasonable care and due

> regard for the lives and persons of others; and (3) The killing must be accidental and not intentional, or without unlawful intent, or without evil design or intention on the part of the slayer. All these elements must concur and the absence of any one of them will involve in guilt. . . . " [sic].

Id. at 108-09, 404 A.2d at 381 (citation omitted).

It was totally unreasonable for trial counsel to have adopted an "all or nothing strategy" in this case as the theory of homicide by misadventure was contrary to the physical evidence. Firearms examiner Ronald Stafford testified that the gun Petitioner used to shoot the decedent could not have gone off accidentally. Dr. Robert Segal, the medical examiner, testified that the external configuration of the gunshot wound to the decedent's head, coupled with the existence of gunpowder inside the wound, "was quite characteristic of a contact wound." Indeed, as the prosecutor pointed out in her closing statement, "the inference of malice and intent" were inescapable by virtue of "the contact wound of the forehead."

Thus, the only reasonable course of action for trial counsel to have taken to escape a finding of specific intent to kill necessary to sustain a first degree murder conviction was to at least assert diminished capacity as a fall-back defense. Magistrate Judge Rapoport, in recommending the denial of the Writ for Habeas Corpus opined that "[t]he presentation of a defense of voluntary intoxication would have conceded criminal liability, there would have been no chance of acquittal" [sic] and therefore, that it was reasonable for trial counsel to relinquish the diminished capacity defense.

The physical evidence in the case, of course, shows that the defense of homicide by misadventure was unreasonable from the very beginning. Yet, even if trial counsel was not unreasonable in pressing ahead with the defense of homicide by misadventure, he certainly was unreasonable in failing to at least mention the diminished capacity defense as an alternative to a first degree murder conviction. Instructive on this point is *Foster v. Lockhart*, 9 F.3d 722 (8th Cir. 1993). There, a habeas corpus petitioner was convicted in state court of rape after a jury rejected his alibi defense. After his appeals were denied in state court, the petitioner filed a habeas corpus petition claiming that he received ineffective assistance of trial counsel because his attorney did not seek an impotency test or present other evidence showing he was impotent and could not have committed the rape. 9 F.3d at 725. The Eighth Circuit, in affirming the district court's grant of relief, held "[a] tactical decision to pursue one defense does not excuse failure to present another defense that would bolster rather than detract from [the primary defense]." *Id.* at 726 (citation omitted).

In the instant case, the evidence that Petitioner was drunk when the gun "accidentally" fired would not have diminished the defense of homicide by misadventure. Indeed, accidents happen even to the sodden. The Commonwealth had introduced evidence that Petitioner had been drinking and defense counsel himself had elicited from Petitioner evidence that he had been intoxicated. Trial counsel even had Francisco Montanez available to corroborate this evidence of intoxication. Trial counsel's assessment that Mr. Montanez would not have been "a really good witness" is undercut by the fact that counsel

called Mr. Montanez as a character witness at trial. Thus, trial counsel had no reasonable basis not to bring this evidence to the attention of the fact-finder.

Finally, Petitioner has been severely prejudiced by trial counsel's dereliction to the point that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. The difference between murder in the first degree and murder in the third degree is drastic: murder in the first degree carries a minimum sentence of life imprisonment without parole whereas murder in the third degree carries a maximum sentence of 10-20 years incarceration. 18 Pa. C.S.A. §§ 1102; 1103; 2502(c). Petitioner is still in jail serving a life sentence. Had the § 308 diminished capacity defense been raised and argument presented, Petitioner may very well have been released from prison already. Thus, where evidence of intoxication exists, trial counsel should have every incentive to bring such evidence to the attention of the fact finder in order to reduce his client's degree of guilt and corresponding sentencing exposure. Under the facts of this case, it was the eminently reasonable thing to do. By granting the instant petition and reversing the judgment of sentence, this Court will signal to all criminal defense counsel that their obligation under the Sixth Amendment is to raise reasonable, non-contradictory defenses at trial for the fact-finder's consideration.

CONCLUSION

For the foregoing reasons, Petitioner Edwin DeJesus prays that this Court grant his petition for a writ of certiorari to review the judgment order of the United States Court of Appeals for the Third Circuit affirming the district court's denial of the Petition for Writ of Habeas Corpus.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWIN DEJESUS	:	
	:	CIVIL ACTION
v.	:	
	:	No. 95-CV-5631
JOHN R. STEPANIK, et al	:	

ARNOLD C. RAPOPORT
UNITED STATES MAGISTRATE JUDGE

REPORT AND RECOMMENDATION

Before the Court is a *pro se* petition for a writ of *habeas corpus* filed by Edwin DeJesus pursuant to 28 U.S.C. § 2254. The Petitioner is currently incarcerated in the State Correctional Facility at Dallas, Pennsylvania. For the reasons that follow, it is recommended that this petition be dismissed and denied without an evidentiary hearing.

PROCEDURAL HISTORY

After a bench trial before the Honorable Juanita Kidd Stout of the Philadelphia Court of Common Pleas, the petitioner was convicted of first degree murder and possession of an instrument of crime on September 15, 1982.[1] The events giving rise to the convictions were that the petitioner shot his girlfriend through the forehead at point blank range, and immediately surrendered at the local police station. The petitioner, represented by new counsel, filed post-verdict motions alleging that trial

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[1] The facts set forth in this procedural history have been taken from the Petition for Writ of *Habeas Corpus*, the District Attorney's Response to the Petition for Writ of *Habeas Corpus*, and the state court record.

counsel was ineffective for failing to call witnesses to testify that the petitioner was so intoxicated at the time the crime was committed and at the time he confessed to police officers that he was incapable of forming the specific intent to kill as required for a first degree murder conviction, or knowingly and intelligently waiving his *Miranda* rights. An evidentiary hearing was held, after which the trial court denied post-verdict motions and sentenced the petitioner to life imprisonment.

The petitioner appealed to the Superior Court, which affirmed the decision of the trial court on December 21, 1984. The petitioner then sought discretionary relief in the Pennsylvania Supreme Court, which was denied on May 6, 1985.[2]

The instant petition was filed on September 6, 1995 seeking relief on the following two grounds:

> 1. Ineffective assistance of counsel for failing to call an available witness as to the petitioner's intoxication at the time of the murder; and
>
> 2. Ineffective assistance of counsel for failing to call available witnesses as to the petitioner's intoxication at the time he confessed to the shooting.

The two allegations will be treated as one claim of ineffective assistance of counsel for failing to call witnesses as to the degree of the petitioner's intoxication.

---

[2] The record reflects that the petitioner sought collateral relief under the Post Conviction Relief Act (PCRA), 42 Pa. C.S.A. § 9541, *et seq.*, but the grounds thereof are not pertinent to this case.

For the reasons stated below, I respectfully recommend that the petition be denied without a hearing.

DISCUSSION

It is well settled that, absent exceptional circumstances, a federal court will not entertain the claims of a *habeas corpus* petitioner until he has exhausted the state remedies available at the time of his federal petition. *Picard v. Connor,* 404 U.S. 270, 275 (1971); *Brown v. Cuyler,* 669 F.2d 155, 157 (3d Cir. 1982); 28 U.S.C. 2254 (b). In this case the respondent has stipulated that the exhaustion requirement has been met; thus the case is ripe for federal habeas review.

First, the petitioner contends that trial counsel was constitutionally ineffective for failing to call Francisco Montanez and other witnesses to establish a "diminished capacity" defense under 18 Pa. C.S.A. § 308, to reduce the degree of murder from first degree, which carries a minimum sentence of life imprisonment, to third degree, which carries a maximum sentence of ten to twenty years imprisonment. He contends that had trial counsel called these witnesses, who were allegedly available, they would have testified that the petitioner was so intoxicated at the time of both the incident and his confession, that his conviction could not have risen above third degree murder.

The testimony from police officers at trial was that the petitioner drove himself to police headquarters, had no difficulty walking, did not smell of alcohol, and was responsive to directions. Three police officers testified that he appeared sober, coherent and had no problem

walking. (N.T. Supp. Hng. 18-20, 34-36). Initially, he denied that he had been drinking, taking medication or drugs, but subsequently stated to police that he had had four or five beers. (N.T. 46). At trial, in a third version, he testified that he had been drinking since 8:00 P.M. on the day of the incident. At his post-verdict hearing he testified that he had told trial counsel prior to trial that he had had a problem with alcohol for many years, but on cross-examination he stated that he had never told trial counsel that the homicide occurred while he was drunk.

The trial court was the finder of fact in this case, and also decided post-trial motions. A hearing was held on the issue of ineffectiveness of trial counsel regarding evidence of the petitioner's degree of intoxication, during which the petitioner, the proffered witnesses and trial counsel testified.

The petitioner had been released on bail prior to and during the trial. At the hearing on post-verdict motions, the petitioner testified that, although he knew where the witnesses lived, he did not ask them to go to court with him the following day to testify at trial because he "had some other things to do."

Trial counsel testified that he had had many conversations with the petitioner, and the strategy they had agreed to pursue was homicide by misadventure. Trial counsel was aware of the proposed witnesses, but could only reach Montanez, who had told trial counsel that he, Montanez, had been high at the time he was with the petitioner (N.T. 162, 202, 211). The petitioner told trial counsel that he had had surgery for an ulcer two days prior to the incident; however, he denied taking any

medication. Trial counsel testified that he believed that the defenses of accident, intoxication and diminished capacity were mutually exclusive, and the trial strategy he and the petitioner had employed was going for an acquittal rather than a third degree murder conviction.

Ineffective assistance of counsel must be evaluated against the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). First the petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 668. Additionally, petitioner must show that counsel's deficient performance "prejudiced the defense" by "depriv[ing] the [petitioner] of a fair trial, a trial whose result is reliable." *Id.* at 687. Petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. If the petitioner fails to satisfy either part of the *Strickland* test, his claim will fail. *Id.* at 697.

In order to maintain a diminished capacity defense due to intoxication, the petitioner must be able to prove that he was in fact intoxicated to such a degree as to be unable of forming the requisite intent. In this case, there was substantial evidence at trial that the petitioner drove himself to the police station, after having gone to his wife's house, and confessed to police that he had shot his girlfriend. Police officers testified that he did not smell of alcohol, had no trouble walking, spoke coherently and responded appropriately. The petitioner's key witness, Montanez, testified at the post-verdict hearing that he was so drunk he was unaware of the petitioner's condition.

Judge Stout, who heard the trial and post-verdict testimony, wrote in her opinion, "in this case the evidence of sobriety was so clear that, to borrow from the lyrics of a song, Appellant 'could have called ten thousand angels' to testify to his drunkenness but their testimony would have been to no avail." Opinion, 7/20/83 at 11.

Trial counsel testified that he did not present evidence of intoxication at trial because it was his strategy to seek a not-guilty verdict rather than guilty of a lesser charge. The presentation of a defense of voluntary intoxication would have conceded criminal liability, there would have been no reasonable chance of acquittal. Therefore, it was reasonable trial strategy for counsel to relinquish the defense of diminished capacity in his attempt to get an acquittal.

In light of the testimony presented at the suppression hearing, the trial and the post-verdict hearing, and arguments made to the Superior and Supreme Courts, the petitioner has failed to sustain his burden under *Strickland*. The acts of trial counsel met the test of constitutionally competent counsel. As Judge Stout stated in her opinion, quoting *Mitchell v. Stephen*, 353 F.2d 129 (8th Cir. 1965), "This appellant and his counterparts, must learn that 'effective counsel does not mean successful counsel' ". Opinion at 12.

Accordingly, I make the following:

RECOMMENDATION

AND NOW, this 22 day of January, 1996, IT IS RESPECTFULLY RECOMMENDED, that the Petition for

Writ of *Habeas Corpus*, pursuant to 28 U.S.C. § 2254, be DENIED AND DISMISSED. There is no probable cause for appeal.

BY THE COURT:

/s/ Arnold C. Rapoport
ARNOLD C. RAPOPORT
UNITED STATES
MAGISTRATE JUDGE

ENTERED 1/23/96

CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWIN DEJESUS	:	CIVIL ACTION
V.	:	NO. 95-5631
JOHN R. STEPANIK, ET AL.	:	

ORDER

AND NOW, this 3rd day of April, 1996, upon careful and independent consideration of the petition for writ of habeas corpus, and after review of the Report and Recommendation of United States Magistrate Judge Arnold C. Rapoport, petitioner's objections to said report, and the government's response to petitioner's objections, it is hereby ORDERED as follows:

1. The Report and Recommendation is APPROVED and ADOPTED.

2. The petition for a writ of habeas corpus is DENIED.

3. There is *no* probable cause for appeal.

/s/ Clarence C. Newcomer
Clarence C. Newcomer, J.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1329

EDWIN DEJESUS,
Appellant

v.

JOHN R. STEPANIK, SUPERINTENDENT; LYNNE ABRAHAM, THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY; WALTER COHEN, THE ACTING ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA (D.C.Civil No. 95-CV-05631)
District Judge: Hon. Clarence C. Newcomer

Submitted under Third Circuit LAR 34.1(a)
June 12, 1997

Before: MANSMANN, NYGAARD and ROSENN,
Circuit Judges

JUDGMENT ORDER

After considering the contentions raised by appellant in his petition filed pursuant to 28 U.S.C. § 2254, to-wit:

Was trial counsel constitutionally ineffective for failing to raise the defense of diminished capacity and/or to call an available witness to bolster such a defense; it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT

/s/ Illegible
Circuit Judge

ATTEST:

/s/ P. Douglas Sisk
Clerk

DATED: JUN 26 1997